

FEDERAL COURT OF AUSTRALIA

Ally v Minister for Immigration and Citizenship [2007] FCA 1373

PRACTICE AND PROCEDURE – Application for leave to file and serve Notice of Appeal – Whether special reasons for granting leave – Consideration of proper use of later facts in respect of a factual question to be determined at an earlier time – Where appeal not without merit and leave granted

Federal Court Rules, O 52 r 15
Migration Regulations 1994 (Cth), r 1.15A

Ally v Minister for Immigration & Anor [2007] FMCA 430, considered
Jess v Scott (1986) 12 FCR 187, considered
Puhlhofer v Hillingdon London Borough Council [1986] AC 484, considered

**SHUKURU ALLY v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND
REFUGEE REVIEW TRIBUNAL
NSD850 OF 2007**

**SPENDER J
30 AUGUST 2007
BRISBANE (HEARD IN BRISBANE (HEARD IN SYDNEY))**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD850 OF 2007

BETWEEN: **SHUKURU ALLY**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
 First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **SPENDER J**

DATE OF ORDER: **30 AUGUST 2007**

WHERE MADE: **BRISBANE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The applicant have leave to appeal from the order of Smith FM on 20 April 2007.
2. The time for lodging an appeal be extended to 17 August 2007.
3. The applicant have leave within 21 days from the date of judgment to file and serve an amended Notice of Appeal and any such further affidavit evidence on which she wishes to rely in support of her appeal.
4. There be no order as to the costs of the application for leave to appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD850 OF 2007

BETWEEN: **SHUKURU ALLY**
AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**

JUDGE: **SPENDER J**
DATE: **30 AUGUST 2007**
PLACE: **BRISBANE (HEARD IN BRISBANE (HEARD IN SYDNEY))**

REASONS FOR JUDGMENT

1 This is an application pursuant to O 52 r 15(2) for leave to file and serve a Notice of Appeal.

2 Order 52 r 15(1) provides:

15(1) The notice of appeal shall be filed and served:

- (a) within 21 days after:
 - (i) the date when the judgment appealed from was pronounced;
 - (ii) the date when leave to appeal was granted; or
 - (iii) any later date fixed for that purpose by the court appealed from; or
- (b) within such further time as is allowed by the Court or a Judge upon application made by motion upon notice filed within the period of 21 days referred to in the last preceding paragraph.

3 Order 52 r 15(2) provides:

15(2) Notwithstanding anything in the preceding subrule, the Court or a Judge for special reasons may at any time give leave to file and serve a notice of appeal.

4 Order 52 r 15(3) provides:

15(3) An application for leave under subrule (2) must:

- (a) be in accordance with Form 54A; and
- (b) include a statement indicating whether the applicant wishes to have the application dealt with without an oral hearing; and
- (c) be accompanied by an affidavit setting out:

- (i) the nature of the matter; and
- (ii) the factual and legal issues in dispute; and
- (iii) the reasons why leave should be given.

5 An application pursuant to O 52 r 15(2) is not an “Application for Extension of Time to File and Serve Notice of Appeal”. However, that is in the title in Form 54A of the Forms in the Federal Court Rules, and repeated in the body of that Form.

6 The Form 54A filed in the present application was:

1. The applicant applies for an extension of time in which to file and serve a notice of appeal from the judgment of the Federal Magistrate Smith given on 20/April/2007 at Sydney.
2. An extension of time is required because a notice of appeal was not filed and served within the time limited by Order 52 rule 15.
3. The grounds of the application appear in the attached affidavit.
 ...

7 While the Form suggests that applicant needs “an extension of time in which to file and serve a notice of appeal,” O 52 r 15(2) permits the Court to grant “leave to file and serve a notice of appeal”.

8 It is not the case, as the Form recites, that an extension of time is required because “a notice of appeal was not filed and served within the time limited by O 52 r 15”: leave is required because a notice of appeal was not filed and served within the time limited by O 52 r 15.

9 Because the only basis relied on in opposition to the grant of leave is that the proposed appeal is without merit, it is necessary to have detailed regard to the history of the matter.

10 The applicant is a national of Tanzania born on 4 March 1970. The decision of the Migration Review Tribunal (the Tribunal) shows that she applied for permanent residence on spouse grounds on 27 July 2000. The Tribunal also noted:

2. The visa application form completed by the applicant incorporated an application for a permanent visa, a Partner (Residence) (Class BS) visa, which

normally cannot be granted until two years have elapsed since the lodgement of the application, and an application for a temporary visa, a Partner (Temporary) (Class UK) visa, which can be granted immediately, to permit stay until a decision is made on the permanent visa. This process is intended to test whether the relationship is continuing, two years after the visa application, before permanent residence is confirmed. The delegate's decisions to refuse to grant the visas were made on 12 June 2003.

11 On 4 July 2003, the applicant lodged an Application for Review with the Tribunal.

12 On 12 October 2005, the Tribunal affirmed the decisions under review, finding that:

... the visa applicant is not entitled to the grant of a Partner (Temporary) (Class UK) Visa, nor a Partner (Residence) (Class BS) visa.

13 The Tribunal had to consider Regulation 1.15A, *Migration Regulations 1994* which contains the test to be applied to determine whether one person is "the spouse" of another person, whether in a married or de facto relationship. The Tribunal said, at [30]:

30. Regulation 1.15A contains the test to be applied to determine whether one person is the 'spouse' of another person, whether in a married or a de facto relationship. In forming an opinion whether a married relationship or de facto relationship exists, the Tribunal must take into account the considerations set out in subregulation 1.15A(3). These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the persons' commitment to each other.

14 The Tribunal then considered, under separate headings, the financial aspects of the relationship, the nature of the household, social aspects of the relationship, and the nature of the persons' commitment to each other. The Tribunal concluded:

53. The Tribunal has considered all of the evidence regarding the aspects of the relationship including the evidence of the history of the relationship since the time of application. For the reasons above, the Tribunal is not satisfied that at the time of application the review applicant and the nominator were in a genuine and continuing relationship. The Tribunal is not satisfied that at the time of application they were mutually committed to a shared life together as husband and wife to the exclusion of all others.

54. The Tribunal accordingly finds that the review applicant and the nominator are not in a married relationship as described in subregulation 1.15A(1A). The Tribunal finds that the review applicant is not the spouse of

the nominator at the time of application in accordance with regulation 1.15A. The Tribunal finds that the review applicant does not meet subclause 820.211(2).

15 Relevant to this conclusion is the history of cohabitation between the applicant and her nominator. In this regard, the Tribunal said:

36. The review applicant stated in her application form that she was living at the same address as the nominator in Woolloomooloo. She told the Tribunal that she lived at that address but also spent time with her sister because of the sister's medical problems, and because she used to baby sit her sister's child. The nominator told the Department in a statement dated 26 July 2000 that he shared the place at Woolloomooloo with a friend, and had done so for 10 months, and that the review applicant spends time with him there. There is evidence of a card addressed to the review applicant and nominator at the Woolloomooloo address, and a car registration in both names showing this address. The Tribunal is not satisfied that the evidence establishes that the review applicant and the nominator established a household together at the Woolloomooloo address.

37. The evidence regarding the parties' subsequent living arrangements is that the review applicant was in Africa from October 2000 until late April 2001, during which period the review applicant resided with her sister in Blacktown. After the nominator returned to Australia in April 2001 he stated that he resided in Woolloomooloo, whereas the review applicant continued to reside with her sister. Evidence has been submitted that the review applicant and the nominator then resided together in Hurstville from 19 May 2001 until November 2001. The Tribunal has considered the evidence that the lease was initially in the nominator's and Ms Bumbabu's name, and that the review applicant's name appears to have been added at a later stage. The Tribunal has considered the review applicant's comments at hearing that she did view the property with the nominator prior to renting it, but this evidence is not consistent with her subsequent statements that the nominator and Ms Bumbabu viewed the property and decided it should be rented. It is also not consistent with the evidence from the real estate agent that the nominator and Ms Bambubu viewed the property. The Tribunal notes that when the Department contacted the review applicant and nominator at that address, the answering machine gave the names of the nominator and Ms Bumbabu only. The Tribunal has considered the review applicant's comments regarding this, but is not satisfied that they adequately explain the absence of any reference to the review applicant in the answering machine message.

38. The Tribunal has considered the other evidence regarding cohabitation at the Hurstville address, including documents showing the review applicant's name at the Hurstville address. The Tribunal accepts that the review applicant may have spent some time at the Hurstville address with the nominator. The Tribunal is not satisfied on balance however that the evidence establishes that the review applicant and the nominator established a household together at the

address in Hurstville.

16 There is no reference in this part of the Tribunal's reasons, to the affidavit evidence of Marie France Bumbabu, nor the statutory declaration dated 17 May 2003 from Hakea Prison by Stanislas Kanengele-Yonjo, formerly known as Musa Pene Okele. The handwritten name of the applicant is consistent with the account of the signing of the rental agreement deposed to by Ms Bumbabu, as is the "signature of tenant". Again, there is no explicit reference to the Notice of Claim to the Department of Fair Trading by all three in respect of the Hurstville premises. A Westpac statement of a joint bank account for the period 29 March to 27 April 2001 was in evidence. There was no evidence as to the period during which this joint account was operated. There are receipts for the joint purchase of furniture dated 7 June 2001 and 27 August 2001, as well as for clothing, on 28 August 2001, in joint names; a receipt for jewellery, as well as a tenancy agreement in respect of the unit at 24/5-9 Fourth Avenue, Blacktown, New South Wales 2148, for six months for the period 4 October 2002 and ending on 3 April 2003 in the name of the applicant and her husband.

17 There is no doubt that the applicant and the nominator were married to each other in Sydney on 16 July 2000. The applicant's visa application was on 27 July 2000.

18 In addition to the consideration of the requirements in subregulation 1.15A(1A), there was a claim by the applicant to the Tribunal based on domestic violence. After the Tribunal had received the statutory declaration from Marie France Bumbabu from the nominator, and a further statutory declaration of the applicant dated 24 March 2005, the Tribunal invited the applicant to provide further comments, as well as information in press reports that the nominator had been diagnosed with HIV in 1999, which the nominator did not, prior to, or after the marriage, divulge to the applicant.

19 The Tribunal said at [15]:

15. In November 2003 the review applicant submitted evidence that the nominator was in custody awaiting trial on a criminal charge. In May 2004 the review applicant submitted that because of the pending charges against the nominator of 2 counts of knowingly infecting a person with HIV, she would be claiming to be a victim of domestic violence. She stated in a statutory declaration dated 3 May 2004, that she had visited the nominator in prison on a number of occasions since the end of March 2003. She learned in April

2004 of the charges against the nominator regarding knowingly infecting persons with HIV, and now felt that she could not resume cohabitation with the nominator.

20 The Tribunal was not satisfied, on the basis that the nominator had failed to advise the applicant of his HIV status, that he was committed to a long-term relationship with the review applicant.

21 The Tribunal said of the claim that the applicant had been the victim of domestic violence at [55]:

The Tribunal has not made any findings in regard to the claim of domestic violence. In regard to the time of application criteria for the visa in clause 820.211, the issue of domestic violence is relevant only in relation to subclauses 820.211(8) and (9) ... the Tribunal finds the review applicant does not satisfy other requirements of the relevant subclauses 820.211(8) or (9), as the review applicant was the holder of a substantive visa at time of application and did not hold a Subclass 300 visa. The Tribunal therefore has not considered the issue of domestic violence in relation to subclauses 820.211(8) and (9). The Tribunal has found above that the review applicant does not satisfy subclauses 820.211(2) – (9) at the time of application. The Tribunal therefore finds that the review applicant does not satisfy clause 820.211, an essential criterion for the grant of a Subclass 820 visa.

22 As to the claim of domestic violence in relation to the time of decision criteria, the Tribunal said at [56]:

The Tribunal has not considered the issue of alleged domestic violence in relation to the time of decision criteria, because the Tribunal has found that the primary visa applicant has not satisfied an essential criterion at the time of application for the grant of a Subclass 820 visa.

23 The delegate of the Minister refused visas to the applicant on 12 June 2003 on the ground that she was “not satisfied that Ms Ally is residing in a genuine spousal relationship with her spouse Mr Pene Okele”. (Emphasis added).

24 The delegate concluded that:

...the couple has never lived together. The nominator has spent large amounts of time overseas and the applicant appears to be residing permanently with her sister, Hadija Ally in Blacktown.

25 The grounds of review to the Federal Magistrates Court contained only one ground. While its formulation was the subject of proper critical comment by the Federal Magistrate, the essence of the ground was distilled by his Honour at [32]:

The ground of review contends that events occurring subsequent to the date of the application were illegally irrelevant to a decision on whether at that date requirements of the definition of “spouse” were satisfied. It was argued that by taking any such events into consideration, the Tribunal made a jurisdictional error such as is described in *Craig v South Australia* (1995) 184 CLR 163 at 179.

26 Smith FM acknowledged that the Tribunal did take into account evidence about subsequent events, including some aspects of the subsequent history of the relationship, when arriving at a series of findings as to the nature of the relationship at the time of the visa application.

27 However, his Honour said:

I am not satisfied that it relied upon this information in any legally impermissible way.

28 His Honour continued:

It is well established that, where an administrative decision-maker is required to address the existence of a state of fact at an earlier date, it is entitled to consider later events. However, a distinction has been drawn as to how later events are able to be considered ...
(Emphasis added).

29 Smith FM set out at [36], in my opinion correctly, the position in relation to the use of subsequent events:

In the present case, some of the judgments required to be made by the Tribunal at the time of application clearly involved evaluative and predictive assessments which were able to be informed by evidence of subsequent events. What was important, however, was that the Tribunal should only address evidence of later events to consider whether they confirmed the existence or otherwise at 27 July 2000 of a marriage in which the parties had “*mutual commitment to a shared life as husband and wife*” and a relationship which at that time was “*genuine and continuing*”. The Tribunal would have erred if, when addressing item 820.211(2)(a) in the light of subsequent events, it addressed the wrong question, such as whether subsequent events showed that the marriage over its whole period or at a later date lacked the elements

required by reg.1.15A.
(Emphasis added).

30 Similar comments can be directed at whether the couple “ever lived together”, as the delegate found, or whether the couple established a household at Hurstville, which the Tribunal rejected. His Honour concluded that the discussion by the Tribunal of “the parties’ subsequent living arrangements” focused on the inconclusive nature of the evidence as to cohabitation at the Woolloomooloo accommodation. The correctness of this finding, and whether the use of later events was only to illuminate the nature of the relationship at the time of the application is, in my opinion, at least arguable.

31 I have set out the history of the various steps in this litigation to provide the basis for my conclusion that the proposed appeal for which leave is sought is not unarguable.

32 The only question presently before the Court is whether leave to appeal should be granted. There is, on such an application, always a temptation to reach a view as to the probable outcome of any proposed appeal.

33 I have referred, somewhat extensively, to the basis for the claim concerning whether the Tribunal’s consideration of subsequent events meant that it had failed to address the right question, and, in particular, whether, in truth, the Tribunal’s consideration of those later events were used by the Tribunal only to illuminate what was said by his Honour to be the equivocal or inconclusive nature of the evidence of cohabitation at the Woolloomooloo address, as Smith FM seemed to conclude.

34 There are, however, other possible arguable grounds on this application. It is said by counsel for the applicant that the applicant relied on the provisions of the Act that relates to “Domestic Violence, which occurred in the marital relationship, but was completely ignored or disregarded by the Federal Magistrate and the Tribunal.”

35 Further, Smith FM said, at [44]:

The applicant’s counsel in his written and oral submissions made unfocused complaints about the Tribunal’s decision which were clearly outside the ambit of his amended application. These were, in my opinion, almost entirely attacks on the merits of the factual assessments reached by the Tribunal.

However, the Tribunal was required to address impressionistic criteria which were particularly difficult to apply to the present case. In this situation a court of judicial review must bear in mind its duty “*to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely*” (*Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, quoted in *Minister for Immigration & Multicultural Affairs v Eschetu* (1999) 197 CLR 611 at [41]). Counsel’s arguments did not cause me to arrive at such a judgment in this case.

36 The draft Notice of Appeal contains a ground:

3. The Federal Magistrate erred by accepting MRT’s “impressionistic criteria”, which revealed a misconception of the law and therefore consciously or unconsciously acted perversely.

37 Whether the factual integers in Regulation 1.15A can fairly and properly be described as “impressionist criteria” is open to argument. It is arguable that the proposition, stated by the Federal Magistrate that a court of judicial review can only interfere in the facts of this case if it was obvious that the Tribunal or the delegate consciously or unconsciously was acting perversely, relying on the observation of Lord Brightman in *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, is an overstatement of what Lord Brightman said.

38 The full quote indicates that the nature of the duty of a Court to respect the fact-making function to the person to whom Parliament has entrusted the decision making power of which his Lordship was speaking, is to be understood in the context of the variable circumstances of fact finding described by the opening words:

Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable ...

39 In this case, the first respondent says that “the proposed notice of appeal has no merit nor is there any jurisdictional error apparent in the Tribunal’s reasons for decision or legal error apparent in the reasons for judgment of the Federal Magistrate.”

40 The first respondent acknowledges that the delay in filing the Notice of Appeal was occasioned by the applicant’s counsel’s absence from Australia and that the delay is short,

and no prejudice has been occasioned by that delay.

41 The respondent submits:

The sole basis for the respondent's opposition to the application is that, in the respondent's submission, the proposed appeal does not have sufficient prospects to justify the Court's discretion being exercised in the applicant's favour.

42 It was submitted, in short, that the proposed appeal would be bound to fail.

43 The fact that an appeal is unlikely to succeed is a different question from whether an appeal has any prospect of success or is arguable.

44 Consistent with the judgment of the Full Court in *Jess v Scott* (1986) 12 FCR 187, I am satisfied that there are special reasons for granting leave to appeal in the present case.

45 I am not to be taken from the observations set out earlier that there are strong grounds for thinking that the proposed appeal will be successful. However, the unusual factual circumstances of this case and the detailed analysis by Smith FM to the proper use of later facts in respect of the factual question to be determined at an earlier time, persuade me that the appeal is not "doomed to fail". Technical default as to filing within time should not be an unscaleable hurdle where possible injustice might result in the absence of the grant of leave.

46 For all of the above reasons, I make the following orders:

- (1) The applicant have leave to appeal from the order of Smith FM on 20 April 2007.
- (2) The time for lodging an appeal be extended to 17 August 2007.
- (3) The applicant have leave within 21 days from the date of judgment to file and serve an amended Notice of Appeal and any such further affidavit evidence on which she wishes to rely in support of her appeal.

47 As to costs, it was necessary for the applicant to bring this application, and to secure the indulgence of the Court by the grant of leave. That application was unsuccessfully

opposed by the first respondent.

48 In the circumstances, it is appropriate to order that there be no order as to the costs of the application for leave to appeal.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 30 August 2007

Counsel for the Appellant: I.N. Asuzu

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 17 August 2007

Date of Judgment: 30 August 2007